

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,
Plaintiff,

v.

FIAT S.p.A.,
FIAT ACQUISITION CORPORATION,
NEW HOLLAND N.V.,
NEW HOLLAND NORTH AMERICA, INC., and
CASE CORPORATION,
Defendants.

Civil No:

Filed:

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On November 4, 1999, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of Case Corporation ("Case") by Fiat S.p.A. ("Fiat"), and Fiat subsidiaries, Fiat Acquisition Corporation ("Fiat Acquisition"), New Holland, N.V., and New Holland North America, Inc. ("New Holland") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that the acquisition would substantially reduce competition in the manufacture and

sale of four-wheel-drive (“4WD”) tractors, large two-wheel-drive (“2WD”) tractors, small square balers, large square balers, and self-propelled windrowers (collectively “hay and forage equipment”) in the United States and Canada. The request for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) injunctive relief preventing consummation of the proposed acquisition; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order that would settle the lawsuit. The proposed settlement permits Fiat and its subsidiaries to acquire Case, but requires divestitures that will preserve competition in the five relevant product markets addressed in the Complaint. The proposed Final Judgment orders defendants to divest New Holland’s Genesis line of 2WD tractors; New Holland’s Versatile line of 4WD tractors; New Holland’s line of tracked tractors that is currently in development; and Case’s ownership interest in Hay and Forage Industries (“HFI”), a joint venture that makes hay and forage equipment.

Defendants must accomplish the divestitures within one hundred and fifty (150) calendar days after the filing of the Hold Separate Stipulation and Order, or five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to purchasers acceptable to the Antitrust Division of the United States Department of Justice (“DOJ”). If the defendants do not do so within the time frame in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell those assets. If the trustee is unable to do so in that time, the Court could enter such orders as it shall deem appropriate to carry out the purpose of the trust which may, if

necessary, include extending the trust and the trustee's appointment by a period requested by the United States.

In addition, under the terms of the Hold Separate Stipulation and Order, defendants must hold specified assets separate and apart from their other businesses until the required divestitures have been accomplished. Defendants must, until the required divestitures are accomplished, preserve and maintain the specified assets to be divested as saleable and economically viable ongoing concerns.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Fiat is an Italian corporation with its corporate headquarters and principal place of business in Turin, Italy. Fiat is an international automotive, construction and agricultural equipment company that manufactures cars, trucks, construction equipment, tractors, and hay and forage equipment. Fiat reported revenues of \$56.6 billion in 1998.

Among Fiat's subsidiaries are New Holland N.V., New Holland, and Fiat Acquisition. New Holland N.V. produces construction equipment, tractors, hay and forage equipment, and other agricultural equipment; it is the third largest supplier of agricultural equipment in the United States and

Canada. New Holland manufactures 4WD agricultural tractors, large 2WD agricultural tractors and hay and forage equipment.

Case is a Delaware corporation with its headquarters and principal place of business in Racine, Wisconsin. Case manufactures 4WD tractors and large 2WD agricultural tractors. Case also owns 50 percent of HFI, a joint venture which produces hay and forage equipment. HFI sells the equipment it manufactures to Case and its joint venture partner for distribution and sale under each company's respective trade names. In 1998, Case reported revenues of \$6.1 billion.

On or about May 15, 1999, Fiat entered into an Agreement and Plan of Merger ("Agreement") to acquire Case for approximately \$4.3 billion. Under the Agreement, Fiat Acquisition and Case will merge, with Case being the surviving entity. New Holland N.V. will subsequently acquire all the issued and outstanding shares of the surviving entity. This transaction, which would eliminate head-to-head competition between Case and New Holland and increase concentration in already highly concentrated markets for tractors and hay and forage equipment, precipitated the government's suit.

B. The Markets

1. Tractors

Agricultural tractors are used primarily on farms for a variety of applications, including pulling implements to till soil and to plant and cultivate crops. Agricultural tractors are produced in a range of horsepower ("hp") and may be either wheeled or tracked. In general, as the size and weight of the implement increases, the horsepower of the tractor required to pull it increases as well. 4WD tractors are manufactured in higher horsepower ranges than large 2WD tractors, and they deliver greater traction for pulling large implements.

a. 4WD Tractors

4WD tractors are high horsepower (205 hp to 425 hp) tractors used mostly for heavy-duty farm applications, including tilling, cultivating, and pulling large implements. Because they pull the largest farm implements, 4WD tractors are more efficient for tilling or cultivating a large number of acres and are used principally by the farmers with the largest acreage. However, 4WD tractors are difficult to maneuver because of their size and weight.

b. Large 2WD Tractors

Large 2WD tractors are typically used to pull medium-sized implements for farm applications that do not require the heavy-duty performance of a 4WD tractor. The horsepower of large 2WD tractors is measured in power take off (“PTO”), the power the tractor generates to operate an implement. In general, PTO is about 85 percent of engine horsepower. Large 2WD tractors range from 140 PTO hp up to about 235 PTO hp. Large 2WD tractors are typically smaller, lighter, and more versatile than 4WD tractors.

2. Hay and Forage Equipment

a. Small Square Balers

Small square balers are generally defined by the agricultural equipment industry as balers that produce a bale of hay with a rectangular face less than two square feet in size. Small square balers collect hay after it has dried in the field, compact it into square bales, tie the bales together with twine, and eject them one by one onto the ground for subsequent collection or transportation. Small square balers are most popular among small farms because the small bales can be easily handled manually.

b. Large Square Balers

Large square balers are generally defined by the agricultural equipment industry as balers that produce a bale of hay with a rectangular face that measures greater than four square feet in size; the bales are usually eight feet in length. Large square balers collect hay after it has dried in the field, compact it into square bales, tie the bales together with twine, and eject them one by one onto the ground for subsequent collection or transportation. Large square bales weigh 1000 pounds or more and, because of their ease in stacking and handling, are favored by large commercial hay operations that must transport their hay.

c. Self-Propelled Windrowers

Self-propelled windrowers are a type of hay harvesting equipment typically used by commercial hay operators. A self-propelled windrower cuts hay, breaks it up for faster drying and lays it on the ground in long columns called windrows so that the hay can dry quickly. Self-propelled windrowers are primarily used by operations that cut a large amount of hay or cut frequently enough to justify the investment in a dedicated piece of machinery.

C. Harm to Competition as a Result of the Proposed Transaction

The Complaint alleges that the acquisition would eliminate head-to-head competition between Fiat and Case in markets for 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers in the United States and Canada. The Complaint also alleges that the acquisition would significantly increase concentration in these markets. As a result of this increased concentration and reduced competition, farmers would likely face higher prices, lower quality, and less innovation in markets for 4WD tractors, large 2WD tractors, small square balers, large

square balers, and self-propelled windrowers if the combination of Fiat and Case is permitted.

Furthermore, entry by new companies would not be timely, likely, or sufficient to prevent these anticompetitive effects.

1. Tractors

Fiat and Case compete against each other to sell 4WD and large 2WD tractors to farmers, to provide high quality and service, and to develop new tractor products. Direct competition between Case and Fiat benefits farmers through lower prices, improved service, and greater innovation. The combination of Case and Fiat would eliminate this direct competition. Furthermore, if the combination were permitted, competition would be reduced as a result of increased concentration in the already highly concentrated markets for 4WD and large 2WD tractors in the United States and Canada.

a. 4WD Tractors

Only five firms sell 4WD tractors in the United States and Canada. In this already highly concentrated market, Case has a share of about 27 percent and Fiat has a share of about 13 percent based on 1998 unit sales. Using a measure of market concentration called the Herfindahl-Hirschman Index (“HHI”), defined and explained in Appendix A, combining Case and Fiat would substantially increase the already high concentration in the 4WD tractor market. The HHI for the 4WD tractor market is about 3025. After the proposed acquisition, the HHI level would increase by about 665 points, resulting in a post-merger HHI of about 3690.

b. Large 2WD Tractors

Only five firms sell large 2WD tractors in the United States and Canada. In this already highly concentrated market, Case has a share of about 25 percent and Fiat has a share of about 10 percent

based on 1998 unit sales. The HHI for the large 2WD tractor market is about 3950. After the proposed acquisition, the HHI level would increase by about 510 points, resulting in a post-merger HHI of about 4460.

2. Hay and Forage Equipment

Fiat and Case — including Case's participation in HFI — compete against each other to sell small square balers, large square balers and self-propelled windrowers to farmers, to provide high quality and service, and to develop new hay and forage equipment products. Direct competition between Case and Fiat benefits farmers through lower prices, improved service, and greater innovation. The combination of Case and Fiat would eliminate this competition. Furthermore, if the combination were permitted, competition would be reduced as a result of increased concentration in the already highly concentrated markets for small square balers, large square balers and self-propelled windrowers in the United States and Canada.

a. Small Square Balers

Four firms account for substantially all of the small square balers sold in the United States and Canada. In this already highly concentrated market, Fiat has a market share of about 47 percent and Case has a share of about 10 percent based on 1998 unit sales. Combining Case with Fiat would substantially increase concentration in the small square baler market. The HHI for the small square baler market is about 3365. After the proposed acquisition, the HHI level would increase by about 900 points, resulting in a post-merger HHI of about 4265.

b. Large Square Balers

Four firms account for substantially all of the large square balers sold in the United States and Canada. In this already highly concentrated market, Fiat has a market share of about 16 percent and Case has a share of about 31 percent based on 1998 unit sales. Combining Case and Fiat would substantially increase concentration in the large square baler market. The HHI for the large square baler market is about 3240. After the proposed acquisition, the HHI level would increase by about 995 points, resulting in a post-merger HHI of about 4235.

c. Self-Propelled Windrowers

Five firms account for substantially all of the self-propelled windrowers sold in the United States and Canada. In this already highly concentrated market, Fiat has a market share of about 18 percent and Case has a share of about 19 percent based on 1998 sales. Combining Case with Fiat would substantially increase concentration in the self-propelled windrower market. The HHI for the self-propelled windrower market is 2215. After the proposed acquisition, the HHI level would increase by about 670 points, resulting in a post-merger HHI of about 2885.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

To preserve competition in the markets for 4WD and 2WD tractors in the United States and Canada, the proposed Final Judgment orders defendants to divest New Holland's Genesis line of large 2WD tractors, New Holland's Versatile line of 4WD tractors, and New Holland's line of tracked tractors that is currently in development. To preserve competition in the markets for small square balers, large square balers, and self-propelled windrowers in the United States and Canada, the proposed Final Judgment also orders defendants to divest Case's interest in HFI. Under the terms of the proposed Final Judgment, defendants must accomplish these divestitures within one hundred and

fifty (150) calendar days after the filing of the Hold Separate Stipulation and Order, or within five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to a purchaser acceptable to the United States. If defendants fail to divest the assets within this period, a trustee, selected by the United States, will be appointed by the Court to sell the assets. Defendants or the applicable trustee must simultaneously identify purchasers of New Holland's tractors lines in order that the United States may jointly review the proposed tractors divestitures.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestitures have not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

The Final Judgment's required divestitures will preserve competition in the markets for 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers in the United States and Canada. Absent the divestitures, Case and Fiat will control significant shares and concentration will substantially increase in each market. The likely result would be an increase in prices, a reduction in quality, and a decrease in innovation in each market. The divestitures ensure that there will be no such anticompetitive effects.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been

injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will give all comments due consideration and respond to each of them. The United States remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and responses will be filed with the Court and published in the *Federal Register*. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section

Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States also considered a full trial on the merits against defendants. The United States is satisfied, however, that the divestitures required by the proposed Final Judgment will facilitate continued viable competition in the manufacture and sale of 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers, and will effectively prevent the anticompetitive effects that would result from the proposed acquisition.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment “is in the public interest.” In making that determination, the Court may consider:

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia Circuit held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government’s complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The courts have recognized that the term “‘public interest’ take[s] meaning from the purposes of the regulatory legislation.” *NAACP v. Federal Power Comm’n*, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve “free and unfettered competition as the rule of trade,” *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), the focus of the “public interest” inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir.1983); *United States v. Waste Management, Inc.*, 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, “the Court is nowhere compelled to go to trial or to engage

in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.”¹ Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)). *See also Microsoft*, 56 F.3d 1448. Precedent requires that:

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “*within the reaches of the public interest.*” More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.²

¹119 Cong. Rec. 24598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D.Mass.1975). A “public interest” determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See H.R. 93-1463*, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

² *Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); *see BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette Co.*, 406 F. Supp. at 716. *See also American Cyanamid Co.*, 719 F.2d at 565.

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a proposed final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest.’”³

VIII. DETERMINATIVE DOCUMENTS

There were no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: November ____, 1999.

³ *United States v. American Tel. and Tel Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *quoting Gillette Co.*, 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Respectfully submitted,

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APPENDIX A

HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

“HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines*

¶ 1.51.